IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

IN RE: SERZONE
PRODUCTS LIABILITY LITIGATION

MDL NO. 1477

THIS DOCUMENT RELATES TO ALL CASES

ORDER

Upon preliminary approval of the settlement agreement and the conditional certification of the settlement class in this case, the court takes special note of the problems concerning contingency fee agreements entered into after the signing of the settlement agreement. For the reasons stated below, the court hereby **ORDERS** that any contingency fee agreement between an individual class member and an attorney that has been or will be entered into after October 15, 2004 and is intended to allow the attorney to recover contingent fees in this case, will not be enforced. The plaintiff's counsel may instead seek reimbursement only pursuant to this Order.

The inherent power and obligation of the federal district courts to limit attorney's fees to a reasonable amount are well-established. *In re A.H.Robins Co., Inc.*, 86 F.3d 364, 373 (4th Cir. 1996).

> Furthermore, as the Sixth Circuit Court of Appeals has made clear, "although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it *requires* courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." *Kalyawongsa v. Moffett*, 105 F.3d 283, 287-88 (6h Cir. 1997)

> (emphasis added); *see Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir. 1981) ("[a] federal district court judge has broad equity power to supervise the collection of attorney's fees under contingent contracts"). As a general rule, "courts have a special concern to supervise contingent fee arrangements." *McKenzie Construction, Inc. v. Maynard*, 758 F.2d 97, 101 (3rd Cir. 1985); *see Allen v. United States*, 606 F.2d 1105, 1108 (4th Cir. 1979) ([t]he district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established"); *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3rd Cir. 1979) ("contingency agreements are of special concern to the courts and are not to be enforced on the same basis as ordinary commercial contracts").

In Re Sulzer Hip Prothesis and Knee Prothesis Liability Litigation, 290 F.Supp.2d 840, 849 (O.H. N.D. 2003). Because Federal Rule of Civil Procedure 23(e) imposes a responsibility on the court to protect the interests of class members from abuse, there is even greater necessity for the court to review the fee arrangements in this case. *See id.* (citing *Dunn,* 602 F.2d at 1109 (3rd Cir. 1979)).

Central to any contingent fee equation is the attorney's assumption of risk. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 U.C.L.A. L.Rev. 29, 74 (Oct. 1989). The ethical justification for recognizing the validity of contingency fee agreements is that the lawyer risks receiving no fee, which merits compensation in and of itself. *Id.* at 70. For example, in *Maryland Attorney Grievance Commission v. Kemp*, the court held that charging a contingent fee for recovery in an undisputed medical payment claim was excessive and unethical. 496 A.2d 672, 678 (Md. 1985). Under Maryland insurance law, payment for no-fault personal injury is mandatory upon the filing of paperwork. *Id.* at 675. Accordingly, the risk of uncertainty of recovery was very low, and therefore, the attorney was not entitled to charge such a high risk premium by enforcing the contingency fee agreement. *See id.* at 677.

Similarly, in this case, the risk of uncertainty of recovery in representing a client who is a

class member is much lower in light of the settlement agreement. Under the terms of the agreement, a class member who presents a valid claim is guaranteed to receive some benefit. There is no guarantee for a client in litigation; indeed, there is significant risk of nonrecovery involved in presenting a valid claim before a jury. In addition to the likelihood of recovery as it exists in the facts of the claim, the time and costs involved in securing that recovery through litigation also factor into the amount of risk that an attorney undertakes at the outset of a case. The settlement agreement has significantly reduced the amount of work required in representing a client who is a class member. At this stage, the only effort required to ensure that a class member receives benefit is to:

> (1) monitor the case to determine whether the Court approve[s] the Settlement Agreement at the Final Fairness Hearing;
> (2) watch to see if the defendants elect[] to withdraw from the settlement, based on opt-outs; and
> (3) timely and properly fill out the claims forms and submit them to the Claims Administrator.[1]

In Re Sulzer, 290 F.Supp.2d at 854. The time and expense involved in such tasks are grossly disproportionate to those faced by an attorney who entered into an attorney-client relationship prior to the settlement agreement. Prior to the settlement agreement, it was plausible that an attorney would be required to perform the costlier and more time-consuming tasks required in traditional representation of a client. After the signing of the settlement agreement, however, both the direct risks involved in the client's recovery and the tangential risk involved in terms of time and expense required to secure that recovery were alleviated.

In these circumstances, an attorney who seeks to enforce a contingency fee agreement entered

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[1]Furthermore, the filing of claims forms is an exercise that does not necessitate the professional expertise of an attorney. The claims administrator in *In Re Sulzer*, reported that the percentage of valid claims filed was equal among represented and unrepresented claimants. *In Re Sulzer*, 290 F.Supp.2d at 854.

into after October 15, 2004 is charging the client a premium for an unassumed risk. Such conduct amounts to charging a clearly excessive fee. This is not to say, however, that these attorneys are not entitled to any payment for their work. They are entitled to a reasonable fee, which the court has calculated upon a reasonable hourly rate. In light of the tasks required for representation of a class member client, I **FIND** that no attorney may bill at a rate greater than $200.00 per hour and no legal assistant at a rate greater than $100.00 per hour. Furthermore, such compensation is capped at $10,000. I **FIND** that these rates, capped at $10,000, adequately reflect both the risk and effort required in this type of representation.

Accordingly, the court **ORDERS** that any contingency fee agreement between an individual class member and an attorney, which has been or will be entered into after October 15, 2004 and is intended to allow the attorney to recover contingent fees in this case, will not be enforced. The plaintiff's counsel may instead seek reimbursement only pursuant to this Order.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: November 18, 2004

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE